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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 884

ISBRANDTSEN COMPANY, INC.,
Petitioner,

against

NORTUNA SHIPPING COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled cause on March 27, 1956.

Citations to Opinions Below

The opinion of the Court of Appeals rendered on March 27, 1956 is Appendix A hereof. The opinions of the District Court are included in the record as printed for the use of the Court of Appeals, nine copies of which will be filed herewith under the provisions of Paragraph 4 of Rule 21, and said opinions are omitted herefrom under the provisions of Paragraph 1, Subdivision (i) of Rule 23.

Jurisdiction

The judgment of the Court of Appeals was entered on March 27, 1956 and the order of that Court granting a stay of the mandate pending application for certiorari to this Court was entered on April 5, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Questions Presented

1. Has respondent shown an arbitrable dispute between owner and charterer under the charter party dated November 12, 1948.

2. Is the New York Statute of Limitations a defense to respondent's demand for arbitration made March 22, 1955 of the dispute arising out of alleged damage to the tugboat at the Port of Le Havre on January 18, 1949.

3. Did respondent waive arbitration of this claim for damage to the tugboat by failing to demand arbitration until March 22, 1955 and in the meantime arbitrating all other claims under the charter party without any specific reservation from such arbitration of this claim for damage to the tugboat?

4. Was respondent guilty of laches in failing until March 22, 1955 to demand arbitration of this claim for damages to the tugboat at the Port of Le Havre on January 18, 1949 during which time all other claims under the charter party were arbitrated without reservation of this claim for damage to the tugboat, witnesses familiar with the matter have died and records have become unavailable.

Statutes Involved

1. Sections 1 to 6 inclusive of the Federal Arbitration Act, at page 1 of Appendix B hereof.

2. Sections 48(1) and 49(6)(7) of the New York Civil Practice Act, at page 4 of Appendix B hereof.

Statement

On November 12, 1948 Nortuna Shipping Company, a Panamanian corporation, respondent herein, chartered to Isbrandtsen Company, Inc., a New York corporation, petitioner herein, the S. S. NORLANDA (14a)*. The vessel was delivered to petitioner at Curacao, Dutch West Indies, on November 16, 1948 for one transatlantic round voyage and was redelivered to respondent on March 31, 1949 (20a).

On January 18, 1949 while the vessel was at the Port of Le Havre, France, a French tugboat was damaged (12a). The owner of the tugboat made a claim against respondent for such damage (7a). Respondent alleges that claim was settled on September 29, 1950 (8a), but petitioner does not admit that allegation (11a). The charter party between petitioner and respondent contained in paragraph 17 a provision for arbitration, as follows:

> "17. That should any dispute arise between Owners and the Charterers, the matter in dispute shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them, shall be final, and for the purpose of enforcing any award, this agreement may be made a rule of the Court. The Arbitrators shall be commercial men."

It was under this arbitration provision that respondent by letter dated March 22, 1955 demanded arbitration of the claim for damage to the tugboat on January 18, 1949 (16a).[1]

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* References are to pages of the appendix to appellant's brief in the Court of Appeals unless otherwise indicated.

[1] The terms of the alleged towing contract (7a) are not admitted (12a) or otherwise established. The petition does not allege who the parties to it were but apparently that contract was between respondent and the owner of the tugboat and not with petitioner, and consequently a claim under that contract is not arbitrable under the charter party. Apparently the alleged towing contract contained no provision for arbitration as the petition alleges the claim was settled to prevent attachment of the S.S. NORLANDA and litigation expenses (7a).

The petition to compel arbitration was filed June 20, 1955 (1a).

Between January 18, 1949 and March 22, 1955, a period of over six years, two officers of appellant familiar with the matter died, Hans Isbrantsen, petitioner's President, and Douglas Chandler, petitioner's Vice President (21a). Also, between January 18, 1949 and May 22, 1955 petitioner and respondent had arbitrated all other disputes arising under the charter party without any specific reservation of the dispute relating to the damage to the tugboat. The first arbitrator was appointed February 8, 1950 more than a year after the alleged damage to the tugboat (35a). The hearings were commenced on May 22, 1951 more than two years after the alleged damage to the tugboat (45a). The award of the arbitrators was made on September 22, 1952, more than three years after the alleged damage to the tugboat (51a). In that arbitration there was no reference to the claim for damage to the tugboat on January 18, 1949. However, it is apparent that respondent was aware of that claim before the arbitration commenced, as is shown by its letter to petitioner dated August 24, 1949 (9a). Petitioner by letter dated August 31, 1949 suggested arbitration (10a) but respondent ignored that suggestion and took no action from August 24, 1949 until March 22, 1955, a period of five years and seven months.

At the time of the arbitration petitioner's then attorney, James W. Ryan, obtained all petitioner's files relating to this vessel. In 1952 James W. Ryan ceased to be attorney for petitioner and retained those files under claim of lien, and from then on they have been unavailable to petitioner (21a).

The basis for federal jurisdiction in the District Court arises under the charter party as a maritime contract and Sections 1 to 6, inclusive, of the Federal Arbitration Act relating to maritime transactions or contracts.

Reasons for Granting the Writ

This cause involves questions of great importance in the shipping world. Numerous charter parties in similar form

are in existence with similar provisions for arbitration. This form of charter party currently is in common use.

In *Son Shipping Co. Inc.* v. *De Fosse & Tanghe, et al.*, 199 F. 2d 687 (2d Cir. 1952) Judge Chase correctly stated at page 689:

> "We are aware that the time within which arbitration may be demanded may be of great importance to the parties who have by contract agreed to have their differences so determined, especially to a shipowner."

The Federal Arbitration Act applicable to maritime contracts of this kind does not itself contain a limitation specifying the time within which arbitration may be demanded. This form of charter party expressly provides for arbitration at New York (Paragraph 17 of Charter Party, 14a). Under the New York Civil Practice Act, Section 1450, such a provision is deemed a consent to the state jurisdiction for enforcement, although enforcement in the federal courts is perhaps more frequent in maritime transactions.

Whether enforcement is in the state or the federal courts, it is important that there be one rule as regards the applicable statute of limitations, waiver and laches, all of which issues are involved in this cause.

A. Failure of Respondent to Show an Arbitrable Dispute.

Respondent has failed to show that the tugboat claim involves an arbitrable dispute between owner and charterer under paragraph 17 of the charter party. That claim apparently arose under the alleged towing contract (7a), to which petitioner was not a party, and the terms of which are not admitted or established (12a). If in tort, the claim is not one between owner and charterer under the charter party (7a), is not a controversy under Section 2 of the Federal Arbitration Act, and is not arbitrable under Section 4 of that Act. The respondent consequently has failed to show any agreement to arbitrate the asserted claim or any arbitrable claim or controversy under Sections 1 to 6 of the Act, set forth in Appendix B hereto.

B. Statute of Limitations.

The New York Statute of Limitations for contract claims is six years [Civil Practice Act, Section 48(1)], and for tort claims is three years [Civil Practice Act, Section 49(6)(7)].[2] Apparently the tugboat claim is a tort claim and as such would be barred by the lapse of three years under the New York Statute of Limitations. However, if it be said that the tugboat claim is a contract claim, such claim would be barred by the six year Statute of Limitations, as the alleged damage occurred on January 18, 1949 and arbitration was not demanded by respondent until March 22, 1955.

We contend that the obligation to arbitrate should be limited to matters not barred by the statute of limitations when the demand for arbitration is made. Proceedings to enforce arbitration presuppose the existence of a valid and enforceable claim. When a claim is time-barred, there is nothing to arbitrate.

Reference is made to the following New York cases to the effect that the enforceability of an arbitration provision presupposes the existence of a valid and enforceable contract at the time the arbitration is sought:

In The Matter of Kramer & Uchitelle, Inc. 288 N. Y. 467, 471

Hammerstein, et al. v. *Shubert* 127 N. Y. S. 2d 249 (Sup. Ct. N .Y. Co. 1953)

Matter of Raphael (Silberberg) 274 App. Div. 625, 627

It consequently is petitioner's position that respondent's demand for arbitration on March 22, 1955 was improper.

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[2] Section 48 and 49 are made applicable to arbitration by Sections 10 and 1459. Under Sections 11 and 15 time runs from the date the alleged right to demand arbitration accrued, in this instance January 18, 1949. Therefore, respondent could not toll the limitation by deferring demand for arbitration to a later date or event or by inaction over an indefinite period of time while circumstances changed to the prejudice of petitioner.

because at that time there was no valid or enforceable claim as a basis for an arbitrable dispute between the owner and the charterer under paragraph 17 of the charter party.

We submit that the same rule should be adopted in all causes arising under this form of charter party expressly providing for arbitration at New York, whether the arbitration agreement is enforced in the state or the federal courts, and whether the alleged claim be in contract or in tort.

If the claim asserted in this cause is deemed one in contract, the claim would be barred by the six year limitation in Section 48, Subdivision 1, of the New York Civil Practice Act.

If the asserted claim is one in tort, the claim would be barred by the three year limitation in Section 49, Subdivisions 6 and 7 of the New York Civil Practice Act.

The very important question concerning the applicability of those two statutory limitations in arbitrations of this kind under the Federal Arbitration Act has not, so far as is known to petitioner, been passed upon by this Court. In *Reconstruction Finance Corp.* v. *Harrisons & Crosfield, Limited*, 204 F. 2d 366; cert. denied 346 U. S. 854, the judges of the United States Court of Appeals were not in agreement, and Judge Clark wrote a dissenting opinion in which reference was made to New York cases. The lack of any definitive rule from that or other cases has resulted in great confusion in the shipping world, which we submit should be resolved by this Court in a review on certiorari of this cause.

C. Waiver

The claim which respondent insists be arbitrated could have been included in a prior arbitration between the same parties. Petitioner contends that by failing to include this claim in the prior arbitration respondent waived the right to have it arbitrated several years later in a separate arbitration.

The alleged damage to the tugboat occurred on January 18, 1949 (7a). In August 1949 there was correspondence

about this claim, at which time arbitration was mentioned (10a; 16a). Between August 24, 1949 and March 22, 1955 respondent took no action respecting the tugboat claim. In the meantime all other disputes under the charter party were arbitrated after the vessel was redelivered to respondent.

Petitioner contends that it is entitled to a decision in this cause sustaining its claim of waiver by reason of respondent's conduct in ignoring the suggestion of arbitration in August, 1949 and in arbitrating the other claims under this charter party without including the tugboat claim. It is petitioner's position that the first arbitration is *res adjudicata* as to all matters which were included or could have been asserted by respondent therein, including the tugboat claim. Moreover, petitioner contends that the arbitration provision in paragraph 17 of the charter party contemplates a single arbitration, and not multiple arbitrations, in the absence of any special agreement to the contrary.

D. Laches

The incident out of which the tugboat claim arose occurred at the Port of Le Havre on January 18, 1949 (7a-8a). There was a suggestion of arbitration in August 1949 (9a; 10a; 14a) but that suggestion was abandoned and nothing ever came of it.[3] Respondent remained silent about the tugboat claim for five years and seven months, from August 24, 1949 to March 22, 1955. In the meantime the statute of limitations on tort and contract claims reckoned from the date of the incident out of which the claim arose (i. e. the alleged tugboat damage) had expired.

[3] The suggestion for arbitration of the tugboat claim in respondent's letter dated August 24, 1949 (7a) is not the demand for arbitration sought to be enforced in this proceeding (8a). That suggestion was abandoned and never revived, and was not referred to in the demand for arbitration made March 22, 1955. For the same reason the reference to arbitration in petitioner's letter dated August 31, 1949 has no present significance except as a reminder that respondent ignored it and remained silent about the tugboat claim from August 24, 1949 until March 22, 1955 (16a).

Respondent claims it settled the tugboat claim September 29, 1950 (8a) but that allegation is not admitted (11a) and consequently that date cannot be significant in the determination of this question. The incident out of which the claim arose on January 18, 1949 occurred in a foreign country. The lapse of such a long time is prejudicial to petitioner in relation to the defense of such claim. The arbitration of all other claims under this charter party without including the tugboat claim was prejudicial to petitioner in relation to any future attempt to arbitrate the tugboat claim. It is prejudicial to petitioner to be saddled with the trouble and expense of multiple arbitrations where one arbitration could have included every dispute between the parties under the charter party.

In addition, during the period of over six years between the time the alleged damage to the tugboat occurred and the time respondent demanded arbitration, petitioner's president and its vice president familiar with the "Norlanda" matter died, leaving petitioner without their knowledge of the matter and their testimony in the defense of any claim presented after their death in 1953. If this claim had been included in the first arbitration, petitioner would have had the benefit of their knowledge and testimony as the responsible officials of the company directly in charge of matters under this charter party.

At the time of the previous arbitration which was concluded by an award in September, 1952 all petitioner's records relating to the matter were intact and available. If this claim had been included in the previous arbitration, those records would have been available at that time. However, those records have since become unavailable to petitioner, but are retained by the estate of petitioner's former attorney under claim of lien, without any reasonable expectation that they will be available for any arbitration which might be had now in this matter.

The long lapse of time, coupled with other events which have transpired between January 18, 1949 when the tugboat incident occurred and March 22, 1955 when respondent demanded arbitration, certainly show prejudice to petitioner

as a result of respondent's delay in pressing the tugboat claim. Moreover, respondent has failed to show any excuse for its delay in pressing the tugboat claim or for its failure to include that claim in the previous arbitration. We contend that after such long delay and inaction on the part of respondent, with the intervention of another arbitration, the burden is on respondent to show that its demand was made within a reasonable time, failing which, arbitration should be denied. In these circumstances we submit that petitioner should have a review on certiorari by this Court of the defense of inexcusable laches interposed to the arbitration respondent has demanded.

Conclusion

For the foregoing reasons it is respectfully submitted that the questions presented in this cause have such importance and general application that this petition for a writ of certiorari should be granted.

Respectfully submitted,

Woodson D. Scott
Attorney for Petitioner

April 18, 1956

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 57—October Term, 1955.

(Argued February 3, 1956 Decided March 27, 1956.)

Docket No. 23903

In the Matter

of the

Petition of NORTUNA SHIPPING COMPANY, Owner of the S.S. "NORLANDA" for an order directing ISBRANDTSEN COMPANY, INC., Charterer of said vessel to Proceed to Arbitration.

NORTUNA SHIPPING COMPANY,

Petitioner-Appellee,

—against—

ISBRANDTSEN COMPANY, INC.,

Respondent-Appellant.

Before:

MEDINA, LUMBARD and WATERMAN,

Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York. Alexander Bicks, *Judge.*

Respondent appeals from an order granting petitioner's motion, pursuant to 9 U. S. C. § 4, to compel arbitration of a dispute under a charter party. Opinion not reported. Affirmed.

McNutt & Nash, New York City (James E. Frehill and Donald B. Allen, New York City, of Counsel), *for appellee.*

Lord, Day & Lord, New York City (Woodson D. Scott, New York City, of Counsel), *for appellant.*

Medina, *Circuit Judge*:

On November 12, 1948, appellee Nortuna Shipping Company made a Time Charter of its S.S. Norlanda to appellant Isbrandtsen Company, Inc. The charter party contained a clause providing for the arbitration of any disputes between the parties. The appeal is from an order made on October 3, 1955, granting Nortuna's petition for a direction that, pursuant to Section 4 of the Federal Arbitration Act (9 U. S. C. § 4), Isbrandtsen be required to proceed to arbitrate a dispute as to whether or not Nortuna was entitled to reimbursement from Isbrandtsen of an amount paid on September 29, 1950, in settlement of the claim of the owner of a tug for damages arising out of a collision between the tug and a bulkhead, as the S.S. Norlanda was being assisted by the tug while leaving the port of Le Havre, France, on January 18, 1949. Under the terms of the standard towing contract Nortuna, as owner of the towed vessel, was subject to absolute liability for any damage sustained by the tug.

Isbrandtsen opposes arbitration, alleging that Nortuna had waived the right to arbitrate this particular dispute by proceeding to an award with the arbitration of a number

of other miscellaneous matters arising out of the charter party operation, and that the right to arbitrate the tug damage dispute was barred, either by the Statute of Limitations or by the laches of Nortuna.

That the right to compel arbitration under the Federal Arbitration Act may be waived is clearly established. E.g., *American Sugar Refining Co.* v. *The Anaconda*, 5 Cir., 138 F. 2d 765; *Galion Iron Works* v. *J. D. Adams Mfg. Co.*, 7 Cir., 128 F. 2d 411; *William S. Gray & Co.* v. *Western Borax Co.*, 9 Cir., 99 F. 2d 239; *Radiator Specialty Co.* v. *Cannon Mills, Inc.*, 4 Cir., 97 F. 2d 318; *La Nacional Platanera* v. *North American Fruit & S.S. Corp.*, 5 Cir., 84 F. 2d 881; *Rederiaktieselskabet Nidaros* v. *Steamship Owners Oper. Co.*, S. D. N. Y., 25 F. Supp. 663. In these cases, however, the party held to have waived its right to arbitrate a dispute either had commenced suit in court, as in *La Nacional Platanera* v. *North American Fruit & S.S. Corp., supra*, and *Rederiaktieselskabet Nidaros* v. *Steamship Owners Oper. Co., supra*, or, if named as defendant in an action brought against him, had stipulated for some other mode of settlement, *William S. Gray & Co.* v. *Western Borax Co., supra*, or had answered on the merits or had set up a counterclaim, *Radiator Specialty Co.* v. *Cannon Mills, Inc., supra*. The principle involved is that invoking or actively assenting to the jurisdiction of a court, being manifestly inconsistent with an assertion of the right to arbitrate the same dispute, constitutes a waiver.

None of the cases above referred to control the situation before us now, as the thrust of Isbrandtsen's argument, on the claim of waiver, is that, having submitted once to arbitration it should not be made to do so again with respect to a dispute which existed and was known to Nortuna at the time the first arbitration was had.

But the reason why the waiver argument cannot prevail is, as held by the District Court, that the parties in effect agreed that there should be a separate arbitration of the dispute over the damage to the tug. The general demand for arbitration was made on February 8, 1950, and the

award therein was handed down on November 7, 1952. Prior to all thi, and before Nortuna had settled with the owner of the tu, there was an exchange of letters between the parties undr the dates of August 24 and August 31, 1949, to the effct that the payment to the owner of the tug could be mde "without prejudice to the question of ultimate liabili as between shipowner and charterer" and that the dipute as to who should bear the loss would be arbitrated. We can find nothing in the record before us to indicate hat this arrangement was abrogated or superseded by te later arbitration, where this particular dispute was apprently not considered or passed upon. As the payment tothe owner of the tug was not made until September 29, 950, and the demand for the arbitration which resulted i the award was made on February 8, 1950, it is a natural nference that the arrangement made in August, 1949, ws to be left undisturbed. On this record we cannot upse as clearly erroneous the finding of the District Court tat there had been no waiver by Nortuna.

Nor do we fid any merit in the contentions of Isbrandtsen concerning ne Statute of Limitations and laches, despite the fact tht Nortuna failed to press for arbitration of the tug damge dispute until March 22, 1955.

We are told y appellant that New York law governs and are urged t follow Judge Clark's dissent in *Reconstruction Finane Corp.* v. *Harrisons & Crosfield*, 2 Cir., 204 F. 2d 366, crt. denied 346 U. S. 854. The argument runs somethinglike this: The Federal Arbitration Act specifies no timelimitation on the right to an order compelling arbitratin pursuant to the provisions of 9 U. S. C. § 4; as the agreement between the parties was made in New York and providd for arbitration "at New York," its interpretation andeffect are governed by New York law; the vigorous andwell-reasoned dissent of Judge Clark in the *Reconstructin Finance Corp.* case indicates that, according to New York law, after a lapse of more than six years, there is nolonger any valid and enforceable contract, upon the basis o which arbitration can be demanded and

that this view is supported by *Hammerstein et al.* v. *Schubert,* 127 N. Y. S. 2d 249, decided at Special Term of the Supreme Court, New York County, in 1953. In this connection it may be noted that, even in the majority view expressed in the *Reconstruction Finance Corp.* case the applicability of New York law was merely assumed, *arguendo.*

While there are interesting facets to this argument and there is at least the possibility that the question of the time within which arbitration may be demanded under the Federal Arbitration Act will be worked out in terms of federal law, the facts of this case made it unnecessary for us to probe into these matters. For appellant's entire argument is built upon the assumption that the time began to run from January 18, 1949, when the tug collided with the bulkhead in Le Havre. This plainly cannot be the controlling date even assuming, again *arguendo,* that the crucial date is when the matter in dispute between the parties arose, rather than the date of refusal to arbitrate, for the matter in dispute did not come into existence until September 29, 1950, when Nortuna paid the tug owner. Only then was there a fixed sum of money for which Nortuna could demand reimbursement from Isbrandtsen. Accordingly, the demand to proceed with arbitration, which was made on March 22, 1955, and the commencement of this proceeding to compel arbitration on June 17, 1955, were timely, even if § 48(1) of the New York Civil Practice Act is applicable.

The question of laches remains. It has been held that the right conferred by 9 U. S. C. § 4 is equitable, not legal. See *Marine Transit Corp.* v. *Dreyfus,* 284 U. S. 263, 278. Thus, irrespective of whether the analogous statutory limitation may be used as a rough guide, petitioner may maintain this proceeding only if it has not been guilty of laches. *Holmberg* v. *Armbrecht,* 327 U. S. 392, 395. Laches, however, may not be established by mere delay; some substantial prejudice must be shown. All that we can find here is the assertion that two of appellant's officers have died in the interval and that allegedly relevant documents are unavail-

able because held under an attorney's lien by the estate of appellant's former counsel. But there is nothing to indicate that the deceased officers had any knowledge of material facts not known to others and it is clear that the documents, which are not shown to have any bearing on the controversy, are not permanently beyond reach.

Affirmed.

Appendix B

1. Federal Statute:

§ 1. "MARITIME TRANSACTIONS" AND "COMMERCE" DEFINED; EXCEPTIONS TO OPERATION OF TITLE

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce. July 30, 1947, c. 392, § 1, 61 Stat. 669.

§ 2. VALIDITY, IRREVOCABILITY, AND ENFORCEMENT OF AGREEMENTS TO ARBITRATE

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. July 30, 1947, c. 392, § 1, 61 Stat. 669.

§ 3. STAY OF PROCEEDINGS WHERE ISSUE THEREIN REFERABLE TO ARBITRATION

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration

under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration. July 30, 1947, c. 392, § 1, 61 Stat. 669.

§ 4. Failure to arbitrate under agreement; petition to United States Court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such

an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof. As amended Sept. 3, 1954, c. 1263, § 19, 68 Stat. 1233.

§ 5. Appointment of arbitrators or umpire

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator. July 30, 1947, c. 392, § 1, 61 Stat. 669.

§ 6. Application heard as motion

Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided. July 30, 1947, c. 392, § 1, 61 Stat. 669.

2. State Statutes:

NEW YORK CIVIL PRACTICE ACT, SECTION 48, SUBDIVISION 1:

48. *Actions to be commenced within six years.* The following actions must be commenced within six years after the cause of action has accrued:

1. An action upon a contract obligation or liability express or implied, except a judgment and except as provided by section forty-seven and section forty-seven-a.

NEW YORK CIVIL PRACTICE ACT, SECTION 49, SUBDIVISIONS 6 AND 7:

49. *Actions to be commenced within three years.* The following actions must be commenced within three years after the cause of action has accrued:

* * * * *

6. An action to recover damages for an injury to property, or a personal injury, resulting from negligence.

7. An action to recover damages for an injury to property, except in the case where a different period is expressly prescribed in this article.